

File: WD 3+



State of Idaho

DEPARTMENT OF WATER RESOURCES

Southern Region, 1341 Fillmore Street, Suite 200 • Twin Falls, Idaho 83301-3380

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August 10, 2009

C. L. "BUTCH" OTTER
Governor

GARY SPACKMAN
Interim Director

Robert Oversier
137 Aspen Lake Dr.
Hailey, ID 83333

COPY

RE: Flying Heart Ranch Ponds, Your Correspondence Dated June 8, 2009

Dear Mr. Oversier:

The Idaho Department of Water Resources (IDWR) received your letter dated June 8, 2009 requesting that IDWR investigate water impoundments located on the Peebler property within the Flying Heart Subdivision near Hailey. IDWR received your correspondence on June 17, 2009. Your letter was forwarded to me for response.

Last year, IDWR investigated a similar complaint alleging that the Peeblers had constructed unauthorized impoundments across a stream that flows through the Flying Heart Ranch Subdivision, potentially causing injury to downstream water rights. The Peeblers maintain that these structures were created by beavers. An onsite visit to the impoundments in questions was made by IDWR's Southern Region Stream Channel Specialist, Terry Blau, and I on August 20, 2008. The attached staff memorandum dated August 21, 2008 summarizes this onsite visit. From this visit and lacking sufficient evidence to the contrary, it was concluded that the dams were likely made by beavers. However, neither Terry nor I are biologists, and a full analysis of the dam construction was not undertaken. During our visit it was suggested that trained personnel from Idaho Fish and Game (IDFG) would be contacted to make such an analysis. I have been asked to inquire as to whether or not the IDFG was ever contacted and if arrangements were made for this analysis?

Your letter of June 8, 2009 makes reference to an Idaho Statute regarding beavers and property damage. The statute that we assume you are referring to is Section 36-1107, Idaho Code. You state the following in your letter:

"...we note that there is a statute on the books in the State of Idaho which specifies that beaver dams, if deemed to be causing damage to property and/or interfering with water rights, may be removed by the Idaho Dept. of Water Resources in coordination with the Department of Fish and Game."

IDWR does not concur with your understanding of Section 36-1107. This statute does not authorize IDWR to remove beavers or beaver dams from property, but rather limits IDWR only to investigation of injury to water rights and reporting to the Director of Fish and Game the results of any such investigation. The Director of Fish and Game has specific authorities to control, trap and/or remove beavers, or cause the removal or

modification of beaver dams, houses or structures. Such authority is not provided to the Director of IDWR. We also note that Section 36-1107 provides for complaints to be made directly to the Director of Fish and Game, and that the Director of Fish and Game may consider whether beavers or certain other animals cause damage to any property. The statute is not exclusive to damage or interference to water rights, but it does limit IDWR's scope of investigation to water rights. Therefore, any complaints regarding flooding or damage to adjoining properties, not including water rights, must be made directly to the Director of Fish and Game. In fact, IDWR believes that all property damage complaints, even ones regarding water rights, should first be made to Fish and Game. Specifically, Section 36-1107(a) states that "In the case of water rights, the director (of Fish and Game) shall request an investigation by the director of the department of water resources of the conditions complained of."

If requested by Fish and Game, IDWR and the local watermaster shall make an investigation and/or take measurements to determine if there is in fact injury to the downstream water rights. Kevin Lakey, Watermaster for WD-37, performed such a measurement in 2008. The measurement was made at the best location available and did not support a water right injury finding. In any case, with respect to potential injury to water rights resulting from beavers, the water right holder of record needs to make the claim of injury to Fish and Game. In this particular instance, the Flying Heart Ranch HOA is the water right holder, and one of the officers of the Flying Heart Ranch HOA would need to file such a complaint with the Department of Fish and Game. Potential civil issues related to this complaint, such as damage or flooding to adjoining properties cannot be addressed by IDWR.

With respect to your complaint that the ponds or dams are manmade and therefore a diversion or impoundment of water without valid water rights: IDWR's site investigation last year did not yield conclusive evidence that the dams are manmade. However, IDWR can re-consider questions about the unauthorized impoundment of water if Fish and Game or others provide sufficient and current evidence regarding any unnatural construction of the dams.

Please feel free to contact myself or any of the other Department personnel you have been in contact with if you have any questions regarding this matter.

Sincerely,



Jeffrey S. Cooper
Sr. Water Resource Agent - Southern Region

Attachments: IDWR Staff Memorandum dated August 21, 2008
Letter from Kevin Lakey to IDWR dated August 18, 2008
Letter from Kevin Lakey to Ed Lawson referenced in IDWR Field Visit
memo and dated August 3, 2007

Cc: R. Keith Roark
Fritz Haemmerle
Debra Kronenburg
Vicki Williams
Kevin Lakey
Tim Luke (IDWR)
Idaho Fish & Game -- Magic Valley Region

**Idaho Dept of Water Resources
Field Visit Notes and Narrative**

Date: 8-21-2008

File: Peebler Dam(s)/Williams Complaint

Prepared by Cooper/Blau

Jeff Cooper and Terry Blau made a site visit to the Peeblers' property to inspect impoundment of water deriving from three springs. A discussion of the field visit is found below.

Background

An official complaint was initiated by Mrs. Vicki Williams on July 30, 2008, in an e-mail sent to Dave Tuthill, Allen Merritt, Kevin Lakey, Doug Megargle (IDFG), and David Parrish (IDFG). Mrs. Williams is a homeowner in the Flying Heart Ranch Subdivision and is subsequently a member of the homeowners association. The complaint was filed as a result of a lack of water in two ponds owned by the homeowners association, serviced under aesthetic, recreation, and fish propagation components of water right 37-7767. Water right 37-7767 was recommended for the following:

- 10.0 cfs / 18.0 AFA,
- Priority of 02/27/1979
- Points of diversion at the impoundments located at TWP 02N RNG 18E Sec 5 NWSENE & SWNESE
- Place of use located at 02N 18E Sec 5 NENE, NWNE, & SENE

The shape of the place of use currently on record with the department is nominal, covering the legal descriptions described above. Water rights 37-554 & 37-555 cover the same legal description as 37-7767, but were not claimed in the SRBA. Permit 37-8822 is also serviced by the springs, though it is junior to 37-7767.

In order to ascertain the situation, a field visit was scheduled for August 20, 2008.

Williams' Assertion

According to the initial complaint, the lack of flow has led to problems with noxious weeds, mosquitoes, and algae blooms. It has also lead to poor fish habitat which has consequently depleted the ponds of any fish that were formerly there.

The Williams assert that the dams, as they currently exist, are man made. The evidence they produced in support of their assertion is as follows:

- (1) Mr. Van Williams saw people working in one of the dams after David Murphy, deputy watermaster, released water from it on July 21, 2008. According to the Williams, the dam had been rebuilt by July 25, 2008.
- (2) Ms. Brit (Britt?) Willard, daughter of the Williams, spoke to individuals working on the dam. According to her, these individuals work for Alpine Aquatics and told her they adjust the dam to maintain the depth so as not to flood the Peebler's lawn. Alpine aquatics also maintain the water quality on the Peebler's ground, which includes removal of silt and aquatic vegetation.
- (3) A brick and other man made material were found in the composition of the dam by David Murphy when the dam was breached on July 21, 2008.
- (4) The beaver activity has never been such that the dams were as large and restricting the flow as it has in the last two years.

In conclusion, the Williams assert that the Peeblers have illegally impounded water originating from the spring sources.

****Note:** Attendees at a meeting following a visit to the Peebler's on August 20, 2008 were the following: Vicki Williams – Home Owner, Van Williams – Home Owner (partly by phone), Debra Kronenberg – Attorney for the Williams', Kevin Lakey – Watermaster 37 & 37M, Terry Blau – IDWR Southern Region, Jeff Cooper – IDWR Southern Region.

Peebler's Assertion

The Peeblers maintain that the dams are built by beavers and that the home owners association has no problem with the dams. They supported this assertion by the following: (1) Steve Fisher, an aquatic biologist hired by the Peeblers, pointed out the various aspects that pointed towards the dams being constructed by beavers and (2) Fritz Haemmerle, attorney for the association, indicating the association had no problem with the dams.

Prior measurements taken for River Grove Farms in 2007 indicate negligible flow loss between the sources and the outlet at first aesthetic pond (See letter from Kevin Lakey dated August 6, 2007 to Edward Lawson).

****Note:** Attendees at a meeting at the Peeblers's on August 20, 2008 were the following: Keith Roark – Attorney Representing the Peeblers, Fritz Haemmerle – Attorney Representing the Flying Heart Ranch Home Owners Association, Steve Fisher – Aquatic Biologist, Delores Vega – Caretaker, Roal Ornelas – Security, Kevin Lakey – Watermaster 37 & 37M, Jeff Cooper – IDWR Southern Region, Terry Blau – IDWR Southern Region, Mark Swankey – Landscaper.

Field Visit

Notes from the field visit performed on August 20, 2008:

- At the Peeblers' property, there was the following evidence of beaver activity: (1) freshly cut aspens, (2) beaver slides going from land into water, (3) a beaver lodge located near one of the dams.
- Measurements had been taken on July 31, 2008 by Kevin Lakey indicated a flow difference of 0.29 cfs between the sources and an 8' rectangular weir at the outlet of the first aesthetic lake owned by Flying Heart Ranch. During our brief visit, it was difficult to determine where the loss is occurring (See letter dated August 18, 2008 from Kevin Lakey to the Department).
- The conditions of the aesthetic ponds for the Flying Heart ranch are as described by the Williams.
- It was concluded by Terry Blau that the dams were most likely built by beavers.

Problems

- The Williams will not accept our analysis of the dams as being created by beavers. Because of this, they have requested an expert in the field of beavers from the Idaho Fish and Game to visit the site. This is being coordinated through IDWR, Kevin Lakey, the attorneys indicated above, and the Idaho Fish and Game.
- It is unclear what authority the Williams have in making a call for the water. According to the recommendation for 37-7767, the owner of the water right is Flying Heart Ranch Subdivision II Home Owners Assn. Whereas the Williams are part of but do not hold an office in the association, it is unclear the authority to make a call for the water. Likewise, since the president of the home owners association, Don Brandinberger, has indicated through their attorney, Fritz Haemmerle that the association has no problems with the beaver ponds, the question arises as to

what injury there is to the Williams with regards to water rights. (see Letter from Fritz Haemmerle dated August 21, 2008).

- The recommendation is unclear as to whether or not a portion of WR 37-7767 could cover the ponds if determined to be man made. Review of the claim and licensing exam performed for 37-7767 with Doug Jones (SRBA) should shed light on this issue.
- If it is determined the Williams have authority to make a call for 37-7767, and if the dams are determined to be created by beavers, the question arises as to whether injury is occurring to the downstream user.

Field Photos



Figure 1. Dam directly in front of the Peeblers' home.



Figure 2. Dam on Peeblers' property.



Figure 3. Downstream view of dam located on Peeblers' property.

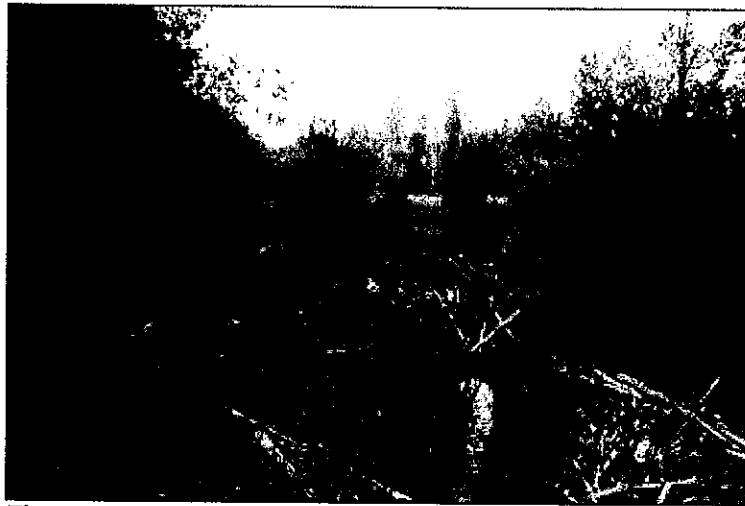


Figure 4. Dam at south end of property. Apparently this is the dam breached by David Murphy.



Figure 5. View downstream of dam, flow going to upper aesthetic pond.



Figure 6. Water backing up side channel towards Perakos' property (adjacent to Peeblers).



Figure 7. Water backed up on Perakos' property.



Figure 8. Upstream view of upper aesthetic pond looking towards Williams' property.

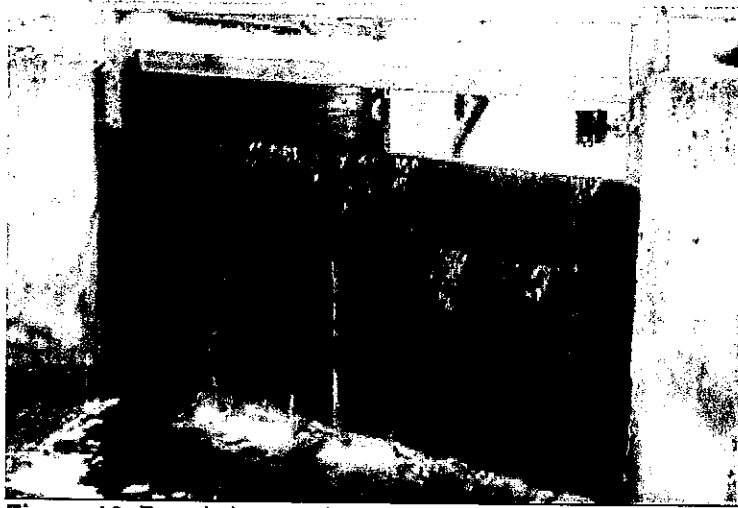


Figure 10. Boards impounding water for upper aesthetic pond.



Figure 11. Lower aesthetic pond (south end). Control works for River Grove Farms diversion. Some minor flow was noted. Watermaster measurements in 2007 showed a loss of up to 225 gpm in this pond. All inflow is currently sinking in the bottom of the pond. (see letter from Kevin Lakey dated Aug. 3 2007).



Figure 12. Control works for River Grove Farms diversion.

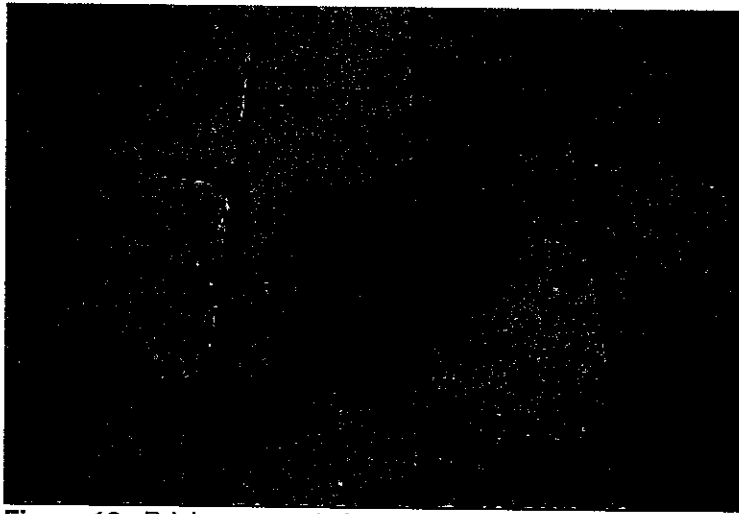


Figure 13. Brick apparently found by David Murphy in the composition of the dam breached August 21, 2008.



Figure 14. Water backing up near William's property due to dams(note beaver activity on tree).

Additional Notes

It should also be noted that during the flood of 2006, the river at the upper end of Flying Heart Subdivision shifted channels from the East to the West. This could account for a decrease in the recharge of the alluvial aquifer feeding the Aspen Lakes Springs. Mrs. Williams mentioned that the water flow has markedly decreased since 2007. This would correspond with the channel shift.

Although, as the Williams's claim, there may have been input by man into rebuilding the dam removed by Mr. Murphy, due to the current beaver activity in the area, it did appear that beaver were maintaining the dam. From past experience and observations, as water flows decrease, beaver will use whatever material is available (mud, rocks, etc...) to seal leaks in their dam to maintain the water level in their pond.

STATE OF IDAHO
DEPARTMENT OF WATER RESOURCES



Kevin Lakey
Watermaster

WATER DISTRICT NO. 37 & 37M

107 WEST 1ST

SHOSHONE, IDAHO 83352

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emailed to: 8/6/07

Lawson
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Garwood

Kevin Lakey

Mr. Edward Lawson
Lawson & Laski, PLLC
675 Sun Valley Road, Suite A
Post Office Box 3310
Ketchum, Idaho 83340

August 3, 2007

Re: Parry Thomas/River Grove Farms Water Call

Mr. Lawson:

I am writing in reply to your July 13, 2007 letter in which you made a call for the delivery of River Grove Farms water.

After gathering flow data, I have found the following flows in and out of what I call the Aspen Lakes System along with measurements at the River Grove Farms Diversion.

Date	Inflow	Outflow	Flow at River Grove Farms Diversion
7/25	237 gpm	225 gpm	0 gpm
7/31	210 gpm	200 gpm	0 gpm
8/2	213 gpm	150 gpm	0 gpm

The inflows are totals of three spring sights that are believed to be the only sources into the system. The outflows are totals of what was measured over the 8 ft. wier at the bottom of what I call "The Big Lake" along with water that is pumped through an asthetic feature on the west side of the Big Lake. After leaving The Big Lake, the water passes through another smaller lake where the remaining flows are totally lost before reaching the River Grove Farms diversion.

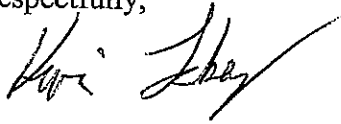
Over the last week we have tried to match the outflows of this lower small lake with its inflows. In doing so we have lowered the small lake to an elevation below the outlet headgate. We can no longer get any water out of the small lake and consequently can get

no water to the River Grove diversion. The small lake is consuming water faster than the water is coming in.

Unfortunately, River Grove Farms has been struck by the same fate as every other water user in the Big Wood River Basin and that is extreme drought and lowered water table levels. Until these natural conditions change, the problem of non-delivery will continue.

In conclusion, due to natural losses from extreme drought conditions, I cannot deliver water to your client. I welcome and encourage further study of this problem and would accept any data your client could produce that would shed further light on this subject.

Respectfully,

A handwritten signature in black ink, appearing to read 'Kevin Lakey', with a stylized flourish at the end.

Kevin Lakey
Watermaster, Districts 37 & 37M

Cc: Allen Merritt, IDWR Southern Region Manager
Fritz Haemmerle, Haemmerle & Haemmerle
Steve Fischer, Hydrologist
Lee Garwood, Idaho Fish and Game

August 18, 2008

Attn: David Tuthill; Allen Merritt; Jeff Cooper; Lee Garwood

Re: Response to Vicki Williams' July 30, 2008 letter.

In response to Mrs. Williams letter, I made an onsite inspection of the properties in question on July 31, 2008. At that time, I visually estimated the flows leaving the large upper lake below the beaver dams as approximately the same as what was coming in from the three spring sources. The next day I measured the three spring sources and calculated the flows at 1.26 cfs. The gage reading at the outflow of the large upper lake was at .55 feet, which equates to .97 cfs as provided by the flow chart developed by Steve Fisher in 2007. With these small flows, I do not have extreme confidence in my flow measurements. Wiers or flumes would be much more accurate at these small flows. By visual appraisal, the large upper lake level was at the sedge grass line which would indicate to me it was at approximately the high water line. Water right 37-7767 that is being called for has a flow component of 10 cfs from the spring sources. With only 1.26 cfs at their sources, the 10 cfs is impossible to deliver. 37-7767 also has a volume component of 18 acre-feet, but by the way I read the water right report this would be for only a one-time fill. With this written response, I am calling for guidance as to whether the storage component of water right 37-7767 is for a one time fill or a continuous fill of 18 acre feet.

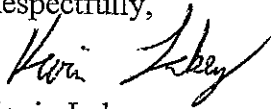
Water right 37-7767 has a year around season of use. By pictures submitted by Mrs. Williams, it shows the water level setting below the gage at the outflow of the large upper lake in late autumn. Historically, this office has not regulated water rights after October 1st. If the spring sources were still flowing at the time this picture was taken, then there may be issues of water right interference by the beaver dams in question in late autumn, but measurements at that time of year need to be taken to prove interference by the beaver dams.

The lower, smaller lake that Mrs. Williams mentions has dropped in level the last two years, because this office has drafted on that lake in an attempt to deliver senior irrigation rights to River Grove Farms downstream. I have enclosed a letter written by me from August 2007 that verifies this drafting. That letter also verifies that the losses within this system occur mainly in this smaller, lower lake not at the beaver dams in question.

Mrs. Williams is correct in stating the Peeblers have no water right, but the question in my mind has never been about Peeblers' water right, but about the interference in delivery of a water right by beaver dams. Based on gathered data, it was my opinion in 2007 and is still my opinion today, that the beaver dams in question are not interfering with the deliver of water right 37-7767, and the components of water right 37-7767 are being met to the extent the right's spring sources flow.

I welcome comment and/or further investigation from the Idaho Department of Water Resources on this matter

Respectfully,

A handwritten signature in black ink, appearing to read "Kevin Lakey", written over the printed name.

Kevin Lakey

Watermaster, Districts 37 & 37M